Villa Maria Nursing and Rehabilitation Center, Inc. and The Service Master Company *and* UNITE! Union of Needletrades, Industrial and Textile Employees, AFL–CIO/CLC. Cases 12–CA–18137 and 12–RC–7957

September 26, 2001

DECISION, ORDER, DIRECTION OF SECOND ELECTION, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On January 5, 2001, Administrative Law Judge Benjamin Schlesinger issued the attached decision. Respondent Villa Maria Nursing and Rehabilitation Center, Inc. (Villa Maria) filed exceptions and a supporting brief. The Charging Party Union filed an answering brief, cross-exceptions, and a supporting brief. Villa Maria filed answering and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] except as discussed below, and to adopt the recommended Order.

Part of this consolidated proceeding involves elections held in Case 12–RC–7957 in two separate employee bargaining units on May 31, 1996. One unit consists of certain classifications of employees of Respondent Villa Maria. The other unit consists of certain classifications of employees of Respondent Service Master Company (Service Master) who work at Respondent Villa Maria's facility.

The Union lost each election. Thereafter, it timely filed a single document entitled "Petitioner's Objections to Conduct Affecting Results of Election." The caption of this document identifies both Villa Maria and Service Master as "Employers." The introductory text preceding specific objections stated that the election was held "at the facility of Villa Maria Nursing and Rehabilitation Center and the Service Master Company (hereinafter 'Employer') in Miami, Florida." The objections themselves consistently refer to the "Employer" and the "election" while alleging conduct that, with one exception noted below, was also alleged in Case 12–CA–18137 as unfair labor practices committed by Villa Maria and Service Master. The Union served copies of the objections on both Villa Maria and Service Master.

Emphasizing the Union's repeated use of the singular for "election" and "Employer" and the parenthetical identification of "Employer" after the objections' introductory mention of Service Master, the judge concluded that the Union clearly intended to file objections only to the conduct of the Service Master unit election. Having found that Respondent Service Master committed no unfair labor practices, the judge recommended dismissal of the Union's objections and certification of the results of each election. In the alternative, in light of the possibility that the Board might find that the Union objected as well to the conduct of the Villa Maria unit election, the judge conditionally recommended setting aside the results of that election based on the preelection unfair labor practices that he found Respondent Villa Maria had committed.[3]

The Union argues in cross-exceptions that the judge erred in finding that it failed to file valid objections to conduct affecting the results of the Villa Maria unit election. We agree. In contrast to the judge, we find that the Union's objections encompassed conduct allegedly affecting the same-day elections held in both units. Not-

[1] Respondent Villa Maria and the Charging Party Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to our dissenting colleague, we would not reverse the judge's credibility resolutions supporting his finding that the Respondent violated Sec. 8(a)(1) by threatening employee Villa Louis. Our review of the record in accord with *Standard Dry Wall* does not convince us that the judge's credibility resolutions concerning the testimony of Louis were incorrect, or that the adverse inference drawn by the judge concerning the Respondent's failure to call Robert Mullen was inappropriate.

[2] Contrary to the dissent, we agree with the judge's conclusion that the Respondent's distribution of an unprecedented and previously unannounced survey of employee working conditions during the Union's organization campaign violated Sec. 8(a)(1). The survey would reasonably tend to persuade employees that the Respondent was soliciting their grievances—indeed, the survey specifically inquired about employees' satisfaction with the handling of grievances—with an implicit promise to remedy them in order to counter the Union's campaign. We reach this conclusion regardless of whether the Respondent actually decided to circulate the survey before it knew about that campaign. The survey cannot be viewed as an existing benefit that the Respondent was obliged to maintain as if there were no union present. Furthermore, the Respondent offered no contemporaneous explanation of the survey's purpose that would have rebutted its reasonable tendency to interfere with employees' Sec. 7 rights.

[3] The judge also conditionally found merit in the Union's objection 6, which alleged violation of the written, preelection eligibility list requirements set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966) (The Union withdrew this allegation as to Service Master at the hearing). In light of our determination to set aside the Villa Maria unit election based on other objections, we find it unnecessary to pass on the *Excelsior* list objection for that election.

withstanding instances of arguably inartful or mistaken grammar, the Union named both Villa Maria and Service Master as "Employers" in the caption for its objections, timely served the objections on both Employers, alleged as objectionable conduct that corresponded directly to unfair labor practice charges filed against Villa Maria, and made these allegations while the joint employer status of the relationship between the two Employers remained in dispute.[4] Moreover, all the issues were fully litigated in the consolidated hearing. Therefore, we find that the Union's election objections were sufficient to raise substantial and material issues concerning conduct affecting the Villa Maria unit election. We further find, in agreement with the judge's alternative reasoning, that the unfair labor practices committed by Villa Maria during the critical period constituted conduct that interfered with this election. This objectionable conduct requires setting aside the election and directing a new election for the Villa Maria unit.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Villa Maria Nursing and Rehabilitation Center, Inc., North Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in the Villa Maria unit in Case 12–RC–7957 is set aside and the representation issue with respect to employees in the Villa Maria unit is severed from the rest of the case and remanded to the Regional Director to conduct a new election when she deems the circumstances permit the free choice of bargaining representative.

[Direction of Second Election omitted from publication.]

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots in the unit found appropriate of employees of The Service Master Company have not been cast for UNITE! Union of Needletrades, Industrial and Textile Employees, AFL–CIO/CLC and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN HURTGEN, concurring and dissenting in part.

[4] There are no exceptions to the judge's finding that Service Master and Villa Maria are not a joint employer of any unit employees working at the Villa Maria facility. Of the complaint allegations against Villa Maria that the judge recommended be dismissed, exceptions have been filed only to the dismissal of the allegation that the "Nurses' Week" celebration was unlawful.

The judge found that the Respondent engaged in conduct that violated Section 8(a)(1) and interfered with the election. Except as set forth below, I adopt the judge's findings and analysis.[1]

1. Section 10(b)

The judge found that the Respondent violated Section 8(a)(1) by unlawfully conferring benefits on employees in order to discourage their union activities. Specifically, the judge found that the Respondent unlawfully granted employees the benefits of a casual dress day (the first of which occurred on the date of the election), and cash prizes for winners of an essay contest.[2] In finding these violations, the judge rejected the Respondent's argument that these grant-of-benefit allegations were barred under Section 10(b) because no timely unfair labor practice charges had been filed which would support these allegations. For the following reasons, I agree with the judge.[3]

Under *Redd-I*, 290 NLRB 1115 (1988), otherwise untimely allegations will not be barred by Section 10(b) when they are closely related to timely filed unfair labor practice charges. In order to be "closely related" under *Redd-I*, the Board evaluates whether the otherwise untimely allegations: (1) involve the same legal theory and usually the same subsection of the Act as the timely filed charges; (2) arise from the same factual circumstances or sequence of events as the timely filed charge; and (3) whether a respondent would raise similar defenses to both allegations. Here, this test is met.

First, the legal theory and sections of the Act raised in the grant-of-benefit allegations are the same as those alleged in the original, timely filed unfair labor practice charge. That charge—which alleged 8(a)(1) and (3) violations—asserted that the Respondent had violated the Act "since on or about January 8, 1996, [when] Agents of the . . . [Respondent] . . . changed working conditions to thwart the Union drive." That allegation of "changed working conditions" is, on its face, broad enough to encompass allegations that the Respondent changed working conditions to the detriment of employees (e.g., reduced employee benefits) in violation of Section 8(a)(3), or changed working conditions for the better

[1] I agree with my colleagues that it is unnecessary to pass on the judge's finding that the Respondent-Employer interfered with the election because the voter eligibility list it provided to the Region was deficient under the requirements of *Exelsior Underwear*, 156 NLRB 1236 (1966).

[2] This casual-dress-day benefit was also found to be objectionable and one of the bases for setting aside the election.

[3] However, I reject the judge's reliance on *Ross Stores, Inc*., 329 NLRB 573 (1999), enf. denied in relevant part 235 F.3d 669, 672 (D.C. Cir. 2001). See my dissenting opinion in *Ross Stores*. See also my dissenting opinions in *Dico Tire, Inc*., 330 NLRB 1252 (2000); and *Tasty Baking Co*., 330 NLRB 560 (2000).

(e.g., granted employee benefits) in order to thwart the organizing drive, a violation of Section 8(a)(1).

Second, the grant-of-benefit allegations arise from the same factual circumstances as did the timely filed charge. Thus, all alleged unlawful changes in conditions occurred in the first 5 months of 1996, in response to the Union's efforts to organize the Respondent's employees.

Finally, the Respondent would raise the same defense to the timely filed "change of working condition" allegation and the grant-of-benefit allegations. That is, the Respondent's defense would be that it did not change working conditions in order to discourage union support or activity.

On these bases, I find that, under *Redd-I*, the grant-of-benefit allegations are closely related to the timely filed charge and are not barred by Section 10(b).

2. Solicitation of grievances

About 2 months before the May 31, 1996 election, the Respondent distributed to its employees an "Employee Satisfaction Survey" wherein the Respondent sought their input on such issues as jobs, benefits, and supervision. The judge found that by distributing this survey, the Respondent violated Section 8(a)(1) by soliciting employee grievances and impliedly promising to remedy them in order to discourage union support and activity. In finding this violation, the judge rejected the Respondent's defense that it had approved the survey prior to the Union's organizing campaign. The judge concluded that even were this true—which he doubted—"Board law does not treat the solicitation of grievances in the same way that it treats the continuation of the payments of wages and other benefits" during an organizational campaign. I disagree with the judge in several respects, and would dismiss this allegation.

First, I find no record basis to support the judge's "doubt" that the Respondent had formulated its survey prior to the Union's organizing campaign. Indeed, the judge's own findings are inconsistent with this observation. The Respondent's witness testified, without contradiction, that the Respondent had approved the "Employee Satisfaction Survey" on January 4, 1996, prior to the Union's organizing campaign. The fact that January 4 preceded the organizing campaign was supported by the judge's own conclusion that the "Union began to organize the employees of Villa Maria . . . on January 6, 1996." However, in questioning the Respondent's claim that the formulation of the survey predated the campaign, the judge relied on the fact that, before January 4, the Union had already begun visiting employees at their homes and organizing other facilities. In so doing, the judge cited neither claims nor evidence that the Respondent was aware of these earlier activities. Therefore, I find no record basis to support the judge's "doubt" concerning the Respondent's defense.

Next, I reject the judge's finding that, even were he to credit the Respondent's claim that the survey predated the organizing campaign, this defense lacks merit because a survey is not like predetermined wage or benefit changes that are to be continued during an organizational campaign. The judge cites no precedent for his conclusion, nor do I find any analytical basis to support it. Employers are required, during an organizational campaign, to act as they would have acted if there were no union on the scene. In my view this includes circulating an employee survey that it had prepared and decided to circulate before the organizing campaign began.[4]

Finally, I reject the judge's conclusion that the survey was unlawful because, by distributing it, the Respondent was inferentially promising to remedy employee grievances. It is well established that a "solicitation of grievances is not in and of itself an unfair labor practice." *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1142 fn. 12 (3d Cir. 1977). "To listen to suggestion does not in and of itself imply that the suggestions will be acted on." *Visador Co*., 245 NLRB 508 (1979). Nor does the use of opinion surveys per se violate Section 8(a)(1). *NLRB v. Tom Wood Pontiac*, 447 F.2d 383 (7th Cir. 1971). Section 8(a)(1) is violated only where the solicitation of grievances—be it by survey or otherwise—is accompanied by an implied or express promise to remedy those grievances which promise is aimed at interfering with, restraining or coercing employees in their organizational effort, or conditioned on the union losing the election. *NLRB v. K&K Gourmet Meats*, 640 F.2d 460, 466 (3d Cir. 1981). Here, I find that no such express or implied promise was made. In this regard, the overview accompanying the "Employee Satisfaction Survey" informed employees that the survey "was a tool to determine what you think about your job, pay, supervision, benefits and the organization in general." The overview further provided that "[y]ou will be informed of the results of the survey upon the tabulation of the completed answers." Nothing in the overview stated or implied that any changes would be made, or benefits granted, as a result of the survey. Nor did the survey itself state or imply that changes would be made. The survey merely asked employees for their response to various employment-related questions. In these circumstances, I do not find it

[4] I recognize that if, in response to the survey, the employer thereafter offers benefits to employees during the critical period, the employer may be found to have violated the Act where those benefits are not a continuation of existing benefits or the conferral of benefits decided prior to the advent of the organizing campaign. However, that is not the case here.

reasonable to infer that employees would view the survey as a promise by the Respondent to remedy employee concerns, conditioned on the Union losing the election, or to interfere with employees' support for the Union. I also believe that employer efforts to learn from employees can be a useful managerial tool. At least where they are adopted prior to a union campaign, I believe that the Board should be respectful of this tool.

Based on the above, I conclude that the Respondent's survey did not unlawfully *promise* a benefit. Nor was the survey itself an unlawful *grant* of a benefit. Assuming arguendo that the survey itself was a benefit, it was decided upon prior to the Respondent's knowledge of the campaign. Thus, the Respondent would likely have acted unlawfully if it had withdrawn the benefit when it learned of the campaign. In sum, the Respondent did what it was supposed to do; it carried out its plan as if there were no union campaign.

Finally, because the survey was not an improper grant of a benefit and because the employees would not reasonably view the survey as a solicitation of grievances and an implied promise to remedy them, I find no merit in my colleagues' reliance on the Respondent's failure to offer a contemporaneous explanation for its distribution of the survey.

Accordingly, I would dismiss this allegation.

3. Threatened loss of benefits

Finally, I do not adopt the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with a loss of benefits if they chose union representation. In this regard, I note that the complaint alleged that these threats were made by a labor consultant retained by the Respondent during the organizational campaign. In support of this allegation, employee Villa Louis testified that consultant John Davis made these threats at employee meetings and in one-on-one discussions with Louis. Crediting consultant Davis' denials, the judge found that neither Davis nor consultant Robert Mullen made such threats at employee meetings, and that Davis additionally did not make unlawful threats in one-on-one discussions. However, because he concluded that, as to the alleged one-on-one incidents, Louis really meant to testify that consultant Mullen, and not Davis, made those threats, the judge found a violation solely because the Respondent did not call Mullen to refute the allegations. The judge concluded that "because the one-on-one conversations were not denied by Mullen, *and only because of that*, I credit Louis' testimony and conclude that Villa Maria violated Section 8(a)(1) of the Act." (Emphasis added.) I find that this is not a sufficient basis on which to support a credibility determination.

In my view, the judge has piled inference upon inference. He inferred that Louis meant to name Mullen as the person making the threat. Although the inference may have been reasonable, it was an inference. Secondly, he inferred that, absent a denial from Mullen, the testimony of Louis (as to the substance of what was said) must be true. However, in my view, since Louis never named Mullen, there was no point in calling Mullen to elicit a denial. In addition, I note that Louis was discredited in other respects and that Davis was expressly credited that neither he nor Mullen made unlawful threats attributed to them, in the employee meetings.

Finally, I reject my colleagues' argument that at issue is a pure credibility resolution that the Board should not set aside. If the judge had found that Louis' demeanor made her testimony credible, I would likely find the 8(a)(1) violation as to one-on-one incidents. However, where, as here, the judge has credited Louis *only* on the basis that Mullen did not testify, I find that there is an insufficient basis to uphold the judge's finding. As noted above, the failure to call Mullen was entirely explainable.

Accordingly, I would dismiss this allegation.

Shelley B. Plass, Esq. (Jennifer Burgess-Solomon, Esq.), on the brief, for the General Counsel.

Michael R. Miller, Esq. (*Kunkel, Miller & Hament*), of Tampa, Florida, for Respondent Villa Maria.

Kelly O. Ludwick, Esq. (*Seyfarth, Shaw, Fairweather & Geraldson*), of Atlanta, Georgia, for Respondent Service Master.

Ira J. Katz, Esq., of New York, New York, for the Union.

DECISION

FINDINGS OF FACT

BENJAMIN SCHLESINGER, Administrative Law Judge. This case involves numerous allegations of surveillance, threats, solicitations, establishment of a new policy providing benefits to employees, and change in the employees' schedules, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as well as objections to the conduct of two Board-conducted representation elections held on May 31, 1996. Respondents Villa Maria Nursing and Rehabilitation Center, Inc. (Villa Maria) and The Service Master Company (Service Master) deny that they violated the Act in any manner.[1]

Jurisdiction is conceded. Villa Maria, a Florida corporation with an office and place of business in North Miami, Florida, is a long-term care facility, a skilled nursing facility, a rehabilita-

[1] The relevant docket entries are as follows: The charge in Case 10–CA–18137 was filed on June 17 and amended on August 29, 1996. The complaint issued on August 30, 1996. The hearing was held in Miami, Florida, on 5 days, between December 11, 1996, and January 7, 1997. The administrative law judge who heard the case decided it on January 9, 1998. On June 28, 2000, the Board ordered on that the proceeding be remanded to a new administrative law judge; and in August 2000 the parties stipulated to waive a trial de novo.

tion hospital, an outpatient center, an adult daycare center, and a home health agency. It is owned by the Archdiocese of Miami and managed by the Catholic Health Services (CHS). During the 12 months preceding the issuance of the complaint, it derived gross revenues in excess of $100,000 and purchased and received at its facility goods and materials valued in excess of $10,000 from other enterprises located within Florida, each of which other enterprises had received the goods and materials directly from points outside Florida. Service Master, organized under the laws of Delaware, with an office and place of business located at the Villa Maria facility in North Miami, has provided housekeeping and laundry services to Villa Maria. During the year preceding the issuance of the complaint, it purchased and received at its Florida facility goods and materials valued in excess of $50,000 directly from points located outside Florida. I conclude that Villa Maria and Service Master are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondents admit, that UNITE! Union of Needletrades, Industrial and Textile Employees, AFL–CIO/CLC (Union) is a labor organization within the meaning of Section 2(5) of the Act.

The Union began to organize the employees of Villa Maria, thinking that all in the facility were employed by Villa Maria, on January 6, 1996,[2] by distributing literature at each of the two vehicular entrances and the one pedestrian walkway to the employer's property. Two days later, the Union held an open house for employees at a nearby Howard Johnson to find out from them their interest in unionization, to distribute authorization cards, and to educate them on what the Union was about. The session was attended by about 10 to 15 persons, some of whom were employees of Service Master. As one of the union organizers was answering questions from the employees, a man, dressed not in uniform, like the employees, but in plain clothes, was walking around in the hallway for a while and then came into the room. He was greeted and given a union card to sign. The other employees turned around, saw him come in, and became quiet. They stopped asking questions. The organizers asked if there were any more questions, and no one raised a hand. There was silence. The meeting ended; and, as it did so, the employees were talking among themselves. One of the workers, Francena Sheffield, whispered to union organizer Cassandra Davis that the man who had walked into the room was one of Villa Maria's supervisors, George Saenz.

Saenz testified that he was not a supervisor and that he had been invited to the meeting, which he attended because he was curious. But the record demonstrates that he was a supervisor. In a memo dated September 15, 1995, George Miraglia, Villa Maria's director of engineering, announced to all employees of Saenz' promotion to engineering supervisor, with congratulations, a fact that no doubt contributed to the employees' uniform understanding and belief that he was a supervisor. A year later, Villa Maria gave him a written appraisal, praising his abilities in accomplishing a series of supervisory functions during the preceding year, including his ability to make recommendations regarding terminations, training, promotions, and disciplines; to supervise schedules and participate in discussions for final dispositions; to plan work schedules and make job assignments; to provide training and in-service to employees; to instruct staff; to coordinate, schedule, and supervise repairs; to handle inventory; and to oversee the daily performance and ground care work of employees. Saenz gave orders to engineers and assisted with ensuring that the contracted security guards were doing what they should during the organizing drive. Indeed, in addition to the security guards, Saenz and Miraglia were the two Villa Maria employees who were responsible for security. Finally, Saenz received additional vacation time and punched the timeclock only once, rather than twice daily, as the other employees did.

Villa Maria contends that Saenz could not be a supervisor because there were only five full-time employees and one part-time employee in the department, making it unlikely that there would be two supervisors in the same department. However, Miraglia also was the director at another facility run by the CHS, Saint John's Nursing Center in Ft. Lauderdale, located about 45 minutes from Villa Maria, and he split his time between the two facilities, spending about 40 percent of his time at Saint John's. Therefore, for the time that he was away, without Saenz being a supervisor, the department would have lacked supervision. I find that Saenz actually supervised employees and possessed ample authority of a supervisor and conclude that he is one. Regarding his supervisory status, I specifically reject Saenz' testimony, and that of George Miraglia, Saenz' supervisor and Villa Maria's director of engineering, and employee David Fleitas to the contrary. Saenz downplayed his functions in order to mislead about his supervisory duties.

Saenz' explanation that he signed an authorization card there because he was "caught off guard" and that he signed the card in a name not his own because he wanted to remain anonymous indicates that he did not want his identity to be proved at a later date, because it was obvious that he was well known at the facility. He was there to see what was going on and to report that fact to the representatives of Villa Maria. On his return to his job, he told Miraglia that he had been to the union meeting. Because the record demonstrates that Villa Maria was overly interested, albeit not in all instances illegally interested, as the complaint alleges, in what the employees were doing and because Saenz was not candid about his actions at the meeting,[3] I conclude that he attended the employees' meeting at the Howard Johnson to spy on their union activities on behalf of Villa Maria, in violation of Section 8(a)(1) of the Act.

The complaint alleges that this violation, as well as many others, were the responsibility of not only Villa Maria, Saenz' and Fleitas' employer, but also Service Master, which the complaint seeks to implicate as the joint employer of all the employees at the premises. In *M. B. Sturgis, Inc.*, 331 NLRB 1298, 1301 (2000), the Board held:

> [T]o establish that two . . . employers are joint employers, the entities must share or co-determine matters governing essential terms and conditions of employment. The employers must meaningfully affect matters relating to the employment

[2] All dates refer to the year 1996, unless otherwise stated.

[3] I note Saenz' curious answer when asked if he reported any employee whom he saw speaking to a union representative or taking a flyer: "I was told it wasn't important."

relationship such as hiring, firing, discipline, supervision, and direction. [Citations omitted.]

Villa Maria and Service Master entered into a management services agreement on March 14, 1995, to provide housekeeping and laundry services to Villa Maria. The agreement provided that Service Master would "train, manage and direct" its employees to support the housekeeping and laundry departments of Villa Maria. Service Master was required to procure all required licenses and permits and to comply with all statutes and regulations necessary to the performance of its functions and to furnish management personnel and the necessary employees and supervisory, training, and technical personnel required to perform its functions. The General Counsel relies on such diverse provisions of the agreement that permitted Villa Maria to ask for the removal of any of Service Master's management personnel who are not acceptable to Villa Maria; that required Service Master to follow the appropriate disciplinary action policies and procedures regarding service workers who are "not acceptable" to Villa Maria; and that established a joint review committee of representatives of Villa Maria and Service Master to meet quarterly to review Service Master's performance under the agreement. The General Counsel also relies on the facts that Lawrence Stallcup, Service Master's director of environmental services, meets with Rutenberg on committees relating to resident care or department head meetings; that Rutenberg reports on activities scheduled at Villa Maria; that Joseph Charles had been employed at Villa Maria since 1974 as a porter/housekeeper/cleaner, but became an employee of Service Master in or around February 1995, after the contract between Villa Maria and Service Master was signed; that Miraglia, who is responsible for facility maintenance and security, instructed Service Master's employees about fire and life safety matters, such as how to open up an extinguisher, extinguish a fire, and ring the bell on the pull stations; and that Service Master's employees contacted him directly to report repairs that needed to be performed.

None of these prove that Villa Maria oversees the daily work or exercises indirect but effective control over Service Master's laundry and housekeeping employees. Further, the General Counsel has not shown, contrary to his contention, that Service Master did not have an assigned on-site supervisor performing the tasks of director of environmental services. The facts that Villa Maria ensures that the work performed by Service Master is adequate shows its control over Service Master, not Service Master's employees. The General Counsel contends that there were meetings of employees of both Villa Maria and Service Master regarding the Union, but there was no showing that the meetings were mandatory or that Villa Maria directed Service Master employees to attend. That is insufficient in meaningfully contradicting the otherwise separate functioning of the two entities. In fact, Stallcup conducted his own meetings with the laundry and housekeeping employees in May 1996. The General Counsel's reliance on *Pacemaker Driver Service*, 269 NLRB 971 (1984), is misplaced. The findings in that decision show far more jointly exercised control than the minor facts present here. Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff Service Master's employees. Villa Maria does not evaluate them or address their grievances. Service Master has no role regarding the security operations at Villa Maria, which alone contracted with West Florida Detective Service (Service) to provide security services at its facility. The guards are not agents of Service Master, as the Union contends. Accordingly, there being no allegations that Service Master independently violated the Act, except as derivatively engaged in by Villa Maria, I dismiss the entire complaint against Service Master.

The complaint alleges that Villa Maria also attempted to spy on another meeting of the employees at the Subway sandwich shop across the street from the facility. The union representatives met several times with employee-members of the organizing committee who reported what was occurring at the facility and delivered signed authorization cards. On one occasion (when was never stated), according to former employee Richard Brown, Jack Rutenberg, Villa Maria's administrator, having seen a union supporter heading in that direction, asked over the walkie-talkie for a volunteer to go to the Subway shop to watch over the employees' union activities. David Fleitas volunteered "to go over there and take down tag numbers of the people who was over there talking to the union people." Fleitas denied that, and Villa Maria generally attacks Brown's testimony on the ground that it forced him to resign and that he was thus biased and prejudiced against it. Brown offered testimony to the Union, thus indicating that he might seek revenge for being asked to resign because of an incident that he felt was unjustified. On the other hand, Brown had no interest in the outcome of this proceeding; but I found his recollections exaggerated and inaccurate and pitched against Villa Maria, although I could not sense that he was not making a good-faith effort to testify as best as he believed he recalled. No matter whether I believe Brown, there is no evidence here that Fleitas actually followed through and looked at and copied the license plates. Accordingly, I dismiss this allegation.

The complaint alleges numerous other acts of surveillance, all of which involved watching union representatives distribute literature 2 or 3 days each week, at least at the beginning of the campaign, the number of days growing to every day by the time of the election, twice each day, in the morning from 6 through 7:30 a.m., and in the afternoon from 2 to 3:30 p.m. An employer's mere observation of open, public, union activity on or near its property does not constitute unlawful surveillance. *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000); *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). In the latter decision, supra at 568 fn. 5, the Board quoted one administrative law judge, "The notion that it is unlawful for a representative of management to station himself at a point on management's property to observe what is taking place at the plant gate is too absurd to warrant comment." *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972). Thus, I dismiss the allegation involving Rutenberg, who is alleged to have watched the leafleting while he was smoking at the front entrance of the facility, smoking being prohibited inside. I also dismiss the allegation involving Kimberly Pero, the director of nursing, who, Brown testified, was watching from the roof of the building. As a matter of law, that claim cannot stand. In addition, she denied that she ever

had been on the roof, and I credit her denial. Pero could have looked out from any window to see what the Union organizers were doing without climbing up to the roof. Brown's testimony was baseless and his wavering between the fact that Pero was or was not on the roof and whether he heard her speak or did not was particularly unconvincing.

In dismissing these allegations, I deny Respondents' defense that no unfair labor practice charges were filed that would support various allegations of the complaint. The original charge, filed against both Respondents, alleged that they engaged in surveillance of employees as they received and distributed union literature, changed working conditions "to thwart the Union drive," threatened employees with loss of jobs and benefits if they supported the Union, solicited and remedied employees' grievances in an attempt to discourage membership in the Union, threatened employees that contract negotiations with the Union would inevitably lead to loss of jobs and benefits, and changed the employees' terms and conditions of employment by changing their work and pay schedules in order to discourage their support for the Union. The amended charge withdrew the allegations about the threat that negotiations would lead to strikes, the remedy of grievances, and the change of work and pay schedules.

In considering the general sufficiency of a charge to support allegations of the complaint, the Board has generally held that a complaint is proper if the allegations are related to and arise out of the same factual situation as the conduct alleged to be unlawful in the underlying charge. Paragraphs 6(c), (g), and (h) allege surveillance; 6(d) and (I) allege threats of loss of employment and benefits; and 6(e) alleges solicitation of grievances, all in complete conformity with the amended charge. Paragraph 6(b) adds the name of Gloria Hanson to representatives of Respondents who allegedly threatened employees with loss of jobs and benefits; paragraph 6(f) alleges that Respondents established a new policy of casual days, designated a "CNA week" and gave parties with free food and drink, and held raffles with prizes, to discourage employees from voting for the Union; and paragraph 7 reinserted the allegation of a change of schedules that had been earlier withdrawn. As the Board stated in *Office Depot*, 330 NLRB 640 (2000):

> The Board stated in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), that in considering the sufficiency of a charge to support an allegation in the complaint under Section 10(b), "the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge." To determine whether the complaint allegations are sufficiently related to the charge allegations, the Board applies a "closely related" test comprised of the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether a respondent would raise similar defenses to the allegations.[3] In *Ross Stores, Inc.*, 329 NLRB 573 (1999), the Board reaffirmed *Nickles Bakery* and other precedent consistently holding that the requisite factual relationship under the "closely related" test may be based on acts that arise out of the same antiunion campaign.[4]

[3] See also *Redd-I, Inc.*, 290 in-text fn. NLRB 1115, 1118 (1988).

[4] Although *Ross Stores* addressed the test for determining whether otherwise time-barred allegations in an amended charge relate back to allegations of an earlier timely filed charge, the same test applies to determining the relatedness of complaint allegations to an unfair labor practice charge. *Ross Stores*, 329 NLRB 573 fn. 6.

All the acts alleged occurred within the first 5 months of 1996 and were based on an overall plan to resist the union campaign. They thus arose from the same factual circumstances or series of events, meeting the Board's second test. Furthermore, Respondents' defense is similar in that they assert that they did not attempt to engage in acts that would discourage the union activities of their employees, a pattern that is alleged in the numerous 8(a)(1) violations alleged in the complaint. That leaves the first test, whether these acts involve the same theory as the acts alleged in the charge. Regarding the addition of Hanson as a person who also engaged in illegal surveillance, there can be no question. (The complaint as to her was dismissed during the hearing.) However, the remainder of the charges alleged acts which were intended to scare the employees from their support of the Union, either by watching over them or by convincing them of the harm (loss of benefits and wages) that would result from their support. The new claim, that they were given new benefits, such as casual days and parties and raffles with prizes, is hardly different, because the natural result of those actions would also be intended to convince the employees to look elsewhere and not to the Union to support them. So closely are they related that the Board has often referred to them as the "carrot and stick," *Overnite Transportation Co.*, 329 NLRB 990 (1999), a device frequently used to thwart union activity. I conclude that the additional allegations are sufficiently related that they satisfy the basic *Nickles Bakery* test. To the extent that Villa Maria continues to maintain its 10(b) defense, which it did not brief, I reject it for the same reasons. Finally, I reject Villa Maria's defense that the complaint should be dismissed because the unfair labor practice charge was filed against "Villa Maria Rehab. Center." Villa Maria had to know that the charge was leveled against it and no other entity.

The remaining surveillance allegations concern the conduct of uniformed security guards, sometimes accompanied and supplemented by Miraglia and Saenz, who watched the leafleting. About six union representatives[4] began leafleting on January 6 in Villa Maria's parking lot, which was private property. Villa Maria's security guard asked them to leave, as did city police who were called when they did not, complaining that others had used the lot for solicitation. Eventually, the police told the representatives that they could not distribute from the parking lot, but had to go to the sidewalk and were not to block the driveway entrances. The representatives then went to cover the two driveway entrances to Villa Maria, as well as the pedestrian walkway. Despite union organizer Gihan Perera's initial claim that they remained on the sidewalk for the rest of the campaign, they did not stay where they should have. In fact, Perera conceded that "some people like volunteers who came out every once in a while stepped on the grass in order to line up on the sidewalk." He added: "There's a sidewalk and there's a grass. Sometimes, they would have 1 foot on the sidewalk and 1 foot on the grass." The union representatives were repeatedly told that they were not to be on Villa Maria property, and the police were called two to three times a week throughout the campaign, up to the day of the election. The police not only responded but also stayed, and it is probable that they would not have remained had the union representatives actually stayed where they were told to leaflet. Furthermore, had the local police not thought that the complaints had some basis, they would have refused to answer them after a period of time.

Villa Maria had concerns other than with trespass on its property. It also had to keep open access to its facility. Patients, staff members, family members, doctors, allied health professionals, and ambulances come to and leave from Villa Maria daily. One of the two driveways had a large pothole and had been closed off for construction even before the Union started organizing and, when it was open during the campaign, the pothole was marked off by cones. On other occasions, it was closed, probably to limit the union activity or to maintain monitoring.[5] As a result, the traffic at the other driveway was doubled, and it was only predictable that there might be congestion in entering and leaving the property, which could only be exacerbated by the union representatives' distribution of leaflets, two on each side, and talking with employees for "couple of minutes," according to union organizer Richard Resua,[6] or for 3 to 5 minutes, according to Brown. To do so, the organizers would stop the vehicles by walking in front of them or holding their hand up. One tieup was perhaps seven cars deep, and the backup of cars caused delays, particularly of critical traffic, such as doctors and ambulances.

Rutenberg's first response to the leafleting and trespass was to hire additional guards, two of whom, some employees said, were dressed in plain clothes. There was not credible corroboration on that issue, and I find that the ones in plain clothes, identified by the fact that they carried walkie-talkies, were probably Saenz and Miraglia, who carried that equipment and were advised by the guards each time the union representatives appeared. The guards

[4] The witnesses' recollection of the number of organizers present varied widely. Brown recalled there being 10 or 20 or 30 or even 40, depending on the day. Cassandra Davis came closest to Brown's highest number, testifying that on one day there were probably 15. Organizer John Belizaire testified that there were no more than 8; Rutenberg testified that there were 6 to 12; and Pero and Mattie Reddick, human resources manager, testified that they saw 3 or 4.

[5] For example, regarding the pothole and construction, Rutenberg testified that "[i]t was blocked after May 31st for a little while. And then I'm not really sure why we took that chain down. It was either because construction was starting or it just wasn't necessary to keep such close monitoring on the three exits."

[6] Resua, aware that Villa Maria was claiming that the Union interfered with the free flow of traffic, when asked for his estimation about how long he spoke to employees, initially answered: "The intent of the organizers was not to stop ingress and egress, so that the conversations were generally limited, but—" at which point there was an objection raised that his answer was not responsive.

who were hired, the ones from Service, wore uniforms. When the Union began its leafleting, Villa Maria employed only one security guard for each of its three shifts. Despite Rutenberg's testimony that on January 8, Villa Maria increased the number of guards to two per shift because there had been an incident where union personnel refused to leave, and after 2 or 3 days reverted to one security guard per shift, the security logs demonstrate that there were up to six security officers as "special reinforcements" present during one shift during the next 3 days. In addition, Rutenberg asked a guard to remain on duty after his normal shift on 2 days, as late as January 19, because Rutenberg was expecting "the Union people" to arrive; so that guard joined the guard coming on duty to monitor the leafleting.

Some of the General Counsel's witnesses testified that, as the campaign progressed, Villa Maria increased its contingent of security personnel stationed within sight of the distribution activity to two or three guards by April, and to four guards by May. However, Rutenberg testified that only in the 2 weeks prior to the election did he increase the number to two. Service's records do not support the General Counsel's witnesses' testimony about the April increases and about the number of guards hired in May. I thus find that Rutenberg's testimony about the number of guards in May was correct and the testimony of the witnesses for the General Counsel, which varied greatly,[7] was inflated. But I also find that the two guards were frequently supplemented in May by Saenz and Miraglia, totaling four people watching the leafleting activities conducted by four union representatives.

The May increase was prompted, according to Rutenberg, by telephone threats made to two patients, graffiti (swastikas and "death to whitey"), desecration of a religious painting, cut cables and call bells, oil sprayed or glue pasted into a VCR, and death or other threats to himself, Miraglia, and Villa Maria's assistant director of nursing, Georgianna Barley. According to Brown, there had been no vandalism at Villa Maria prior to the union campaign. The General Counsel and the union contest these events, but there is corroboration from Brown that Rutenberg stated that he had been threatened, the police were called because of the threats to the patients, and Barley's compelling testimony about the threat to her. I also found convincing Rutenberg's testimony that he took his car out of town for a month because he felt that no one would think twice about damaging his car, which he "loved." I find, therefore, that what Rutenberg relied on occurred and that he hired additional guards in good faith.

The mere presence of a security guard does not constitute surveillance. *Seton Co.*, 332 NLRB 979 (2000). Villa Maria had the right to watch the union representatives to ensure that they did not trespass on its property and that they did not block traffic. It also had the right to resort on a number of occasions to calling for police help in ensuring that its property rights would be honored. The placement of the guards halfway between the sidewalk and the building, approximately 25 feet away from the leafleting, does not appear to be obtrusive and is not unlawful. Because of the activity in May, Rutenberg had the right to hire additional security to protect the patients and staff, including himself, and Villa Maria's property.

Villa Maria, however, never explained the reason that so much time was spent by the security guards and Miraglia and Saenz watching the activities of the union representatives. Villa Maria's conduct went far beyond the "mere observation" permitted by *Hoschton Garment*. The guards engaged in continuous scrutiny. *Impact Industries*, 285 NLRB 5, 7 (1987); *Arthur Briggs, Inc.*, 265 NLRB 299 (1982), enfd. mem. 729 F.2d 1441 (2d Cir. 1983). Not only was there monitoring by one guard on patrol, as there had been prior to January 6, but the numbers increased dramatically, to six for 3 days beginning on January 8, and two for 2 days starting on January 18, and two guards, plus Miraglia and Saenz, for the 2 weeks in May before the election, when there were as many guards and security personnel watching the leafleting as there were union representatives doing the leafleting.

Villa Maria did not show that the increased number of personnel was necessary to ensure the protection of its residents or any of its property rights. The leafleting could have been observed from any window in the three-floor facility that faced the front. The patients and property could have been protected from the inside of the facility. Rather than ordinary or casual observation, the increased number of guards, supplemented by Villa Maria's internal security staff, was intended to intimidate employees engaging in protected and union activities. *Epic Security Corp.*, 325 NLRB 772, 776–777 (1998); *Sands Hotel & Casino*, 306 NLRB 172 (1992), enfd. mem. sub nom. *S.J.P.R. Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); and *Shrewsbury Nursing Home*, 227 NLRB 47, 50 (1976). Indeed, had Rutenberg been so concerned with vandalism and threats, one wonders why he did not permanently station the guards inside the building, where the damage was being done and the threats were being made.

In addition, the guards went far beyond merely watching the leafleting. Shortly after filing the petition for an election on April 22, the guards stood much closer to the union representatives, sometimes 6 feet away, sometimes 1 foot, despite the union representative's complaint that it was illegal for them to monitor the leafleting in that manner. They replied that they were just doing their jobs and doing what they had been told to do. Miraglia told a guard to keep an eye on those speaking with the union representatives and accepting union literature. They discussed names of employees and license tag numbers of their vehicles. Guards wrote on their clipboard after employees obtained literature. The day after the election, a security guard told Resua "that his job had simply been to write down the names and license plates of people who stopped to take Union literature or who spoke to organizers." Resua complained that it was objectionable conduct for them to be writing names and license plate numbers of union supporters, and the guard responded that Resua did not have to worry because the guards already had a complete list of the union supporters. I conclude,

[7] According to Cassandra Davis, in early February, the number of guards increased in early February from one to two, then later to three, and by late April into May to four. Sheffield stated that there were four or five guards in January; employee Villa Louis stated that there were four throughout 1996, and a few more plus the maintenance employees during the few weeks before the election.

from all the facts, that Villa Maria violated Section 8(a)(1) of the Act by engaging in surveillance.[8]

The complaint contains a number of allegations that Villa Maria solicited grievances, changed its conditions of employment, and threatened various adverse consequences to discourage its employees' support of the Union. About 2 months before the May 31 election, for the first time, Barbara Griffith, director of human resources, distributed satisfaction surveys to determine what the employees thought about their jobs, pay, supervision, and benefits, and asked that the employees answer three pages of questions. Included in the questions were the employees' satisfaction with how individual complaints and problems were handled, whether their coworkers were satisfied with working there, their interest in an alternative health plan, and their satisfaction with employee benefits and the salary administration program based on performance evaluations that generated salary increases. At the end of the survey the employees were asked to fill in a fourth page with any other thoughts that they had regarding their working environment, supervisor, compensation and benefits, recognition, and communication. Villa Maria defends this survey on the ground that it had been approved on January 4, prior to the Union's attempt to organize the employees. However, the Union started organizing the employees even earlier, in October 1995, albeit only by visits to the employees' homes, and the Union also began organizing the employees at other facilities owned by the Archdiocese.

It is well established that when an employer institutes a new practice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging his employees that the combined program of inquiry and correction will make union representation unnecessary." *Orbit Lightspeed Courier System*, 323 NLRB 380, 393 (1997); *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). I so conclude. Villa Maria's reliance on *Grove Valve & Regulator Co.*, 262 NLRB 285 (1982), is misplaced. There, the survey was distributed with the express notice, repeated twice, that the employer was, by distributing the survey, making no promise of any changes of employee wages, benefits, or working conditions. Even if Villa Maria had decided to issue the survey before it learned of the union campaign, a position that I doubt, Board law does not treat the solicitation of grievances in the same way that it treats the continuation of the payment of wages and other benefits. I reject, therefore, Villa Maria's reliance on *Churchill's Supermarkets*, 285 NLRB 138 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988), cert. denied 490 U.S. 1046 (1989).

On May 13, Barbara Griffith, the director of human resources of the CHS, announced a new rule permitting employees of Villa Maria to wear casual clothing, not their uniforms, the last Friday of each month. Villa Maria instituted that rule on Friday, May 31, the day of the election. There is nothing in the record that shows that wearing apparel was at all an issue among the employees, but permitting them to wear casual clothes, rather than their uniforms, was obviously not intended to make their working conditions more harsh. Rather, the logical intent was to make them feel good, and the change of the rule geared to the day of the election cannot be looked at as anything other than an effort by Villa Maria to encourage a vote against representation by the Union. I conclude that Villa Maria violated Section 8(a)(1) of the Act.

In 1995, all nurses, including certified nursing assistants (CNAs), celebrated a "nurses' week" during May. In 1996, Villa Maria divided that week into two weeks, one for the registered nurses and one exclusively for the CNAs, during which there was musical entertainment with a band and a disk jockey, food and drinks from Subway and Pizza Hut, raffles, and prizes awarded for dancing, including cash or gift certificates. The credible evidence, including the testimony of employee Villa Louis and Brown on cross-examination and the failure of the Counsel for the General Counsel to ask Sheffield, a longtime CNA, about this allegation, convinces me that the CNA week was celebrated in June, after the election, rather than in May, a fact on which the complaint is apparently predicated. There is nothing in the record that indicates when the separate CNA week was announced, if it was. Accordingly, I find that the mere separation of the one-week celebration into two weeks, with the second week being held after the election, could not be understood as an attempt to dissuade employees from supporting the Union and conclude that there is no violation here.

However, on April 3, Villa Maria also announced a new essay contest, with monetary awards, one sponsored by the Florida Health Care Association for CNAs with 1 year of service. In addition, the CHS was to judge all entries, without regard to the length of service of an CNA, with separate cash awards from $75 to $150, with winners, according to the written announcement, to be announced on May 3, but, according to the testimony, to be given during the CNA week. The contest announced by the Florida Health Care Association is not subject to Villa Maria's control, and the announcement cannot constitute an unfair labor practice. However, Villa Maria's addition of its own award to CNAs was a new benefit intended to influence them in their choice in the election. I conclude that that violated Section 8(a)(1) of the Act. *Grove Valve & Regulator Co.*, supra.

The complaint alleges that Villa Maria changed employees' work schedules on or about January 9, an allegation supported by Louis, who testified that before the Union began its campaign, she was scheduled to work every other weekend, or twice a month, but after the union campaign began, Villa Maria required her to work three weekends each month, a schedule that continued until a month after the election, when she returned to working two weekends each month. Villa Maria's schedules demonstrate that Louis erred: her schedule changed in 1995, long before the Union began to organize the employees. Shef-

[8] Villa Maria contends that a review of all of the reports of the security guards shows that they did not write the license plates of the employees and that the guards were required to note the license plates of every vehicle that made deliveries. Miraglia testified, however, the guards would write on a piece of paper the license plates of those coming into the facility to make deliveries. I find that the guards could just as easily, and did, write the license plate numbers on papers other than their official reports.

field's testimony appears to support Villa Maria's defense that the schedule change was made earlier. I dismiss this allegation.

The complaint also alleges that Villa Maria threatened employees with the loss of employment and benefits if they voted in the Union, an allegation supported by Sheffield, who testified that at a meeting on January 8, Rutenberg told all the employees of both Villa Maria and Service Master that, if they signed papers concerning the Union, they "would" lose their pension and their homes. I discredit her testimony for several reasons. First, I found that she generally exaggerated. Second, I found that, although she remembered these statements, she could remember little else of all the meetings that she attended, claiming that "it's been so long, I don't remember." Third, during cross-examination, she changed her testimony from "would" to "could." Fourth, despite the fact that the meeting was attended by more than 150 employees, Sheffield was the only one who testified that she heard these remarks. Finally, Rutenberg testified that he informed the employees that in collective bargaining everything goes on the table and that what the employees have now does not mean that that would be what they would have after the Union and management reached a contract. Their conditions might be better, worse, or the same. Furthermore, in discussing the possibility of strikes, he mentioned that when employees strike, some unions pay strike benefits that are not a lot of money. He asked whether those benefits would be sufficient for employees to make their house and car payments. From those remarks, Sheffield may have thought that Rutenberg was making a threat, but he was not. I dismiss this allegation.

A number of allegations concern two labor consultants, John Davis and Robert Mullen, retained by both Villa Maria and Service Master. Louis testified that, about 2 weeks before the election, at a meeting conducted by them, the person she identified as John said that, if the employees joined the Union, they were going to lose their benefits, such as their pension plan, and Villa Maria would reduce their days and hours. Furthermore, if the employees paid $10 every month to the Union, the Union would not "do any good for you, because they always rent, using rent car. They always living in the hotel. They get our, they going to get our money to pay their bills." Finally, in two one-on-one conversations within 2 or 3 weeks of the election, "John" also threatened that Villa Maria would reduce the employees' vacations from 2 weeks to 1 and their holidays from 8 days to 4. Louis testified that the two consultants were both tall and that John was white and was a member of the Union (she "used to call him to come in to help us") when she was working at Bayshore Convalescent Center and Bob was black. In reality, she had their skin colors reversed, and Davis denied ever hearing of Bayshore and denied that he had made the statements that obviously were being attributed to the white Mullen, who Davis testified was previously a union organizer in a union that represented nursing home employees and who did not testify.

The General Counsel asks that I draw an adverse inference from Mullen's failure to testify, and I will do so. Villa Maria clearly knew that it was Mullen that Louis was testifying about but tried to take advantage of her mistake in calling him "John." I find that Davis was the more credible witness and credit his denial that neither he nor Mullen made the comments attributed to them at the meeting. However, because the one-on-one conversations were not denied by Mullen, and only because of that, I credit Louis' testimony and conclude that Villa Maria violated Section 8(a)(1) of the Act. I specifically do not credit her testimony, supporting an allegation that admittedly was not made in the complaint, that Human Resources Manager Mattie Reddick promised that if the Union did not win the election, the employees would get everything they needed. Reddick denied making that statement and Louis admitted that Reddick talked to the employees about the benefits that they already had without a union and said that they could do just as well without a union as with a union.

Finally Joseph Charles, an employee of Service Master, testified that at a meeting about 2 weeks before the election Davis or Mullen told the Service Master employees that they would have no benefits if they voted for the Union. The counsel for the General Counsel represented that she had called Joseph as a witness to testify about Saenz' duties as a supervisor. There was no allegation in the complaint against Service Master about this incident, and I find that it was not fully litigated, in light of counsel's representation. Similarly, I will not consider Brown's testimony that Mullen told Service Master employee Jeff Worthy that Sheffield tricked people into signing union membership cards and that people lost jobs working in a union. I find that this was not alleged and not litigated.

The Objections

On April 22, the Union filed a representation petition for an election naming both Respondents as the Employer. On May 8, 1996, the Regional Director for Region 12 approved a Stipulated Eection Agreement for Villa Maria employees in the following unit:

> All full-time and regular part-time employees employed by Villa Maria Nursing and Rehabilitation Center, Inc. (Villa Maria), in the following classifications: CNAs, Restorative CNAs, Unit Clerks, Health Information Management (Medical Records) Clerks, Engineering (Maintenance) employees, Patient Representatives (Admission Clerks), Purchasing Assistant, Pharmacy Drivers, Recreation Therapy Assistants, and Dietary employees (including cooks), employed by Villa Maria at its facility located at 1050 NE 125th Street, Miami, Florida; *excluding* all employees, housekeeping, office clerical employees, LPNs, RNs, professional and technical employees, guards and supervisors as defined in the Act.

On the same date the Regional Director approved a Stipulated Election Agreement for Service Master employees in the following unit:

> All full-time and regular part-time housekeeping and laundry employees employed by The Service Master Company at Villa Maria Nursing and Rehabilitation Center, Inc., at 1050 NE 125th Street, North Miami, Florida; excluding all other employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

Separate elections were conducted on May 31, 1996. The Union lost in the Villa Maria unit, with 59 votes cast for it, 65 votes cast against, and 6 challenged ballots, which were insufficient to change the results of the election. The Union also

lost the Service Master unit, 15 to 8. On June 7, 1996, the Union, by one of its attorneys, timely filed objections, which essentially complain about the same alleged in the complaint. In the caption named both Respondents are named and referred to as "Employers." However, the objections were titled "Petitioner's Objections to Conduct Affecting Results of Election." There is no reference to two elections being held. Rather, only the singular "Election" is referred to, not the plural "Elections." Thus, the objections end with the prayer "that the election be set aside and a new election held at the earliest possible date and time."

In the body of the objections, the title of the objections, quoted above, is repeated, with the modification that the "election" was held "at the facility of Villa Maria Nursing and Rehabilitation Center and The Service Master Company in Miami, Florida (hereinafter 'Employer')." "Employer" clearly is intended to refer to Service Master and not both Respondents, because the word is used repeatedly only in the singular. The reference is not "(hereinafter collectively 'Employer')." The only evidence that would at all show that the Union intended to object to the conduct of Villa Maria was the fact that, at least according to the Regional Director's order directing a hearing on the objections, the Union served the objections on both Respondents. However, that may have been merely a courtesy mailing of copies on all parties to these proceedings and does not vary the language of the objections that the Union filed. Accordingly, I conclude that the only valid objections served were those on Service Master, and the only objection that was not also an unfair labor practice allegation was that Service Master gave to the Union an incorrect *Excelsior*[9] list, an objection that was withdrawn at the hearing. Accordingly, because I conclude that there is no proof that Service Master violated the Act, I conclude that the objections have no merit and remand Case 12–RC–7957 to the Regional Director for Region 12 for further action.

In the event, however, that the Board should find that the objections were validly filed against Villa Maria, some of the unfair labor practices that I have found occurred before the filing of the petition and do not constitute objectionable conduct. The announcement of the new casual day, the surveillance in May, and the threats by Mullen to Louis occurred between the filing of the petition and the election and constituted conduct which interfered with the election, requiring the scheduling of a new election for the Villa Maria unit. In addition, the Union contends that 13 of the 147 addresses contained on Villa Maria's *Excelsior* list were inaccurate. Villa Maria Administrative Assistant Glennis Wallace testified that she compared the addresses with Villa Maria's records and that nine were consistent with Villa Maria's records (the Union found one of these employees), one contained a typographical error, and three contained the addresses of other employees. In sum, Villa Maria submitted a list with four mistakes of its own. That is less than 3 percent, far less than the 7 percent that the Board found not objectionable in *Bear Truss, Inc.*, 325 NLRB 1162 (1998). I dismiss this objection.

[9] *Excelsior Underwear*, 156 NLRB 1236 (1966).

In doing so, I note the Board's recent decision in *Woodman's Food Markets*, 332 NLRB 503 (2000), which involved the omission of 12 eligible employees from the *Excelsior* list where the union lost the election by 13 votes. The Board reconfirmed that "employees have a Section 7 right to make a 'fully-informed' choice in an election, and . . . the purpose of the *Excelsior* rule is to protect that right," quoting from *Thiele Industries*, 325 NLRB 1122 (1998), and held that:

> in determining whether an employer has substantially complied with the *Excelsior* requirements, the Board must consider not only the number of names omitted from the *Excelsior* list as a percentage of the electorate, but also other factors, including the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer's reasons for omitting the names.

The Board specifically, at footnote 11, did "not reach . . . whether the policy adopted . . . with respect to the omission of names should also apply to incorrect addresses." Because the Board did not reach that issue, which is the issue presented here, I am bound by current Board law. However, just as in *Woodman's Food Markets*, the votes of the employees with bad addresses could have made a difference. If all the challenged employees voted for the Union, the election would have been tied, 65 votes for union representation and 65 votes against. Thus, consistent with the remedy afforded in *Woodman's Food Markets*, the matter might have to be returned to the Regional Director for determination of the challenged ballots; and, if their votes, or the votes of some of them were opened and it was determined that the Union lost by three votes, then Villa Maria's objection would be sustained and the election would be set aside.

In addition, the Board has held that a finding of bad faith will preclude a finding that an employer was in substantial compliance with the *Excelsior* rule. *Bear Truss, Inc.*, 325 NLRB at 1162 fn. 3. The Union advised the Board of the bad addresses, and the Board agent called back giving the Union the addresses that Villa Maria had given him. Why the errors that were testified to by Villa Maria at the hearing could not have been determined when the Union complained was not explained and evidences Villa Maria's bad faith. *Medtrans*, 326 NLRB 925 (1998).

REMEDY

Having found that Villa Maria has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record,[10] I issue the following recommended[11]

[10] The Union's motion to correct the reference in the official transcript to the year "1992" to "1996" on p. 523 is granted, without opposition.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Villa Maria Nursing and Rehabilitation Center, Inc., North Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of its employees engaged in union and concerted protected activities.

(b) Threatening its employees with loss of benefits if they voted in UNITE! Union of Needletrades, Industrial and Textile Employees, AFL–CIO/CLC (Union).

(c) Soliciting complaints and grievances from its employee through surveys.

(d) Establishing new benefits, such as casual days and prizes, to discourage its employees from voting for or supporting the Union.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in North Miami, Florida, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Villa Maria's authorized representative, shall be posted by Villa Maria immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Villa Maria to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Villa Maria has gone out of business or closed the facility involved in these proceedings, Villa Maria shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Villa Maria at any time since January 8, 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint against Villa Maria is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the complaint against The Service Master Company is dismissed in its entirety.

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in surveillance of our employees engaged in union and concerted protected activities.

WE WILL NOT threaten our employees with loss of benefits if they voted in UNITE! Union of Needletrades, Industrial and Textile Employees, AFL–CIO/CLC.

WE WILL NOT solicit complaints and grievances from our employee through surveys.

WE WILL NOT establish new benefits, such as casual days and prizes, to discourage our employees from voting for or supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

VILLA MARIA NURSING AND REHABILITATION CENTER, INC.